to have lost something of that nice and critical self-respect, which proves so indispensable in maintaining a high degree of honor and decorum in any profession or pursuit. And we greatly fear that in combining both orders of the profession in this country, we shall be more in danger of pulling them all down to the lower level than likely to bring them all up to the higher plane of professional honor and purity. There are, no doubt, in the English bar, a very large proportion of members, who have almost no occupation, but who live in chambers at the different inns of court, and subsist in a very small way, upon a narrow income, inherited perhaps; and whom you will never see in court or in society; but who are nevertheless pure-minded, clean-handed men; not a whit inferior in point of character to the ablest men in Westminster Hall or Lincoln's Inn. We have no such men, and never can have, whose very presence is a rebuke to vice, and a defence from crime. Many of our hangers-on, upon the contrary, are a dead weight to drag us downwards. And by hangers-on we mean to embrace many who are nominally in the bar, but have gone into other and more hopeful pursuits on the score of emolument or promotion, and among the number many who have gone into political life, and who subsist upon robbery of one kind or another. From none of our number do we receive more fatal wounds. I. F. R.

RECENT AMERICAN DECISIONS.

Supreme Court of Errors of Connecticut.

EDWARD S. ROBERTS *v.* WILBUR HALL.

A. held the promissory note of the defendant, obtained of him by fraud, and which the defendant had demanded back immediately on discovering the fraud. The note was payable to A.'s order and on time, and before due A. endorsed it to the plaintiff in trust in part for certain creditors and the balance for A.'s wife, the plaintiff having no knowledge of the infirmity of the note. The creditors accepted the transfer and directed the plaintiff to bring suit on the note when due. *Held*, 1. That so far as the trust for A.'s wife was concerned, the plaintiff took the note as agent of A., and therefore with its infirmity. 2. That the entire transaction by which the note was transferred to the plaintiff was out of the regular course of business, and that the note therefore remained open to the defence of fraud.

The wife of A. was living apart from him, but was not divorced. *Held* not to affect the case.

The taking of negotiable paper as payment of or security for a pre-existing debt is not out of the regular course of business.

The question whether negotiable paper was taken in the regular course of business resolves itself into the inquiry whether mercantile paper is ordinarily used in the manner in which the paper in question was used, and whether a business man would ordinarily have received the paper, in the circumstances in which it was offered, and parted with his property for it.

THE note in suit was one of two notes, given for the purchase-money of certain property sold to the defendant by one Yale. The defendant was induced by fraud to give his notes for $700 for property which was worth but $400. The day after the sale the fraud was discovered by the defendant, who thereupon offered to return the property to Yale, and demanded a return of his notes; but Yale refused to accept the property and return the notes. The other note and $79 of this note were paid to Yale from the avails of certain collaterals, which payment exceeded the value of the property. This note, before due, was transferred to the plaintiff, in trust for the payment of certain creditors named, with a balance payable to the wife of Yale, who was then living apart from her husband, and who had since been divorced. The creditors assented to the trust, and directed the plaintiff to commence and prosecute this suit. The note was more than sufficient to pay the creditors named, so that, if collected, there would be a balance to be paid to the wife. The plaintiff had no knowledge of the fraud, and took the note in good faith for the purposes aforesaid. There was no consideration for the transfer, except the claims of the creditors. Whether the payee was or was not, at the time of the transfer of the note, insolvent, did not appear.

G. C. Woodruff & Hitchcock, for plaintiff in error.

E. W. Seymour, for defendant in error.

The opinion of the court was delivered by

CARPENTER, J.—The Superior Court rendered judgment for the plaintiff. The court, therefore, must have decided that the plaintiff took the note in good faith, for a valuable consideration, and in the regular course of business. The case presents two questions:

1. Is the plaintiff to be regarded as the trustee for the creditors, or the agent of the payee? If the latter, it is conceded that the plaintiff is not entitled to recover; if the former, then the

plaintiff insists upon his right to recover, and the defendant denies it. We think the plaintiff, to a certain extent, is a trustee for the creditors. The auditor has clearly found that the note was transferred to the plaintiff in trust for the creditors and Mrs. Yale, and that the creditors ratified and confirmed said transfer, and that the plaintiff is following their directions in bringing and prosecuting this action. In respect, however, to that portion of the note which was payable to Mrs. Yale, we are clearly of the opinion that he was the agent of the payee, and was in no sense a trustee for creditors. The ordinary relations between husband and wife will be presumed to have existed in this case until the contrary appears. It is only found that they were living apart, and have since been divorced. No indebtedness from him to her is found; and, so far as appears, the money, as soon as paid to her, would have been subject to his control.

The legal effect of the transaction then, so far as it relates to this question, is the same that it would have been if the balance had been payable to him. To the extent of that balance, therefore, the judgment is clearly erroneous, and it must be reversed.

2. Was this note taken in the regular course of business? In the discussion of this question we shall not controvert the legal proposition that a negotiable note, transferred before due in the regular course of business to a creditor, in payment of, or as security for, a pre-existing debt, is taken in good faith and for a valuable consideration, and is collectable in the hands of the creditor, notwithstanding any equities existing as between the original parties thereto. That question has been correctly settled in this state and elsewhere, and we have no disposition to disturb it: *Brush* v. *Scribner*, 11 Conn. 388; *Bridgeport City Bank* v. *Welch*, 29 Id. 479.

Nor do we place our decision upon the ground that this note was obtained by fraud. We suppose the general rule to be, that fraud is not available as a defence in cases of this character. To this rule, however, there are exceptions: *Foster* v. *Mackinnon*, 4 Law Rep. C. P. 704; *Nance* v. *Lary*, 5 Ala. 370.

But it is not material to our present purpose to inquire whether this case falls within those exceptions. Our object is rather to consider whether the rule of law which exempts commercial paper from legal defences, applies to a case like this. We think it is pertinent to that inquiry to call attention to the fact, that

this note was obtained by fraud; that the contract was not only voidable, but was actually avoided by the maker immediately upon discovering the fraud. We need not say that it is the duty of the court to protect the maker and prevent the consummation of the fraud, if it can be done consistently with the rules of law.

The only difficulty that we can perceive is in preserving unimpaired the rule of law giving immunity to negotiable paper, and the principles upon which it rests. That rule does not protect paper which was not taken in the usual course of business. That phrase, as Mr. Parsons, in his work on Notes and Bills, vol. 1, p. 256, justly remarks, "is open to some objections, for the reason that it does not clearly indicate what are the legitimate uses of negotiable paper. The question is variously expressed in the books: "Was it in the course of trade?" "Was it in the ordinary and regular course of business?" "Was it a transaction which the law views as according to the usage of merchants?"

A more definite idea of its meaning may be had, however, by stating the question more specifically. Is negotiable paper ordinarily used in the way and manner this was used? Would a business man, of ordinary intelligence and capacity, receive commercial paper, when offered for the purposes for which this was transferred, as money, and upon its credit part with his property? Or would he at once suspect the integrity of the paper itself, and the credit and standing of the party offering it? A correct answer to these questions must settle conclusively the mercantile character of this transaction.

The fundamental principle of the law, applicable to negotiable paper, is that it is the representative of money, and may be used in all mercantile transactions as its substitute. But when used for any purpose outside the usual and ordinary course of business, it ceases to carry with it the privileges and immunities with which the law clothes negotiable paper. The tendency of the law in respect to the legitimate uses of negotiable paper is thus referred to in 1 Pars. on Notes and Bills 257: "And therefore we are disposed to believe that the law of this country is tending towards the rule, that whether negotiable paper is sold or discounted, or endorsed over to pay a new debt or for a new purchase, or to secure a new debt or an old debt, or to pay an old debt, it becomes in each case the property of the holder, and carries with it all the privileges of negotiable paper unless there be something

in the particular transaction which is equivalent to fraud, actual or constructive." It will be noticed that this language is comprehensive, and was doubtless intended to embrace every instance in which such paper may be used and still retain its privileges. But it is not sufficiently broad to cover this case, as we shall presently see.

The doctrine that commercial paper may be properly used as security for a pre-existing debt, has been disputed, and there are conflicting decisions upon that point; but it is now pretty generally established.

The profession, however, did not readily acquiesce in the doctrine, inasmuch as there is an apparent hardship in allowing the holder of such paper, who parted with nothing upon its credit, to recover of one, who, as against other parties, has a good defence. The reason upon which this doctrine rests, and without which the law would undoubtedly have been determined otherwise, is, that a very considerable portion of the negotiable paper made in business, is used in this way. We can easily understand, therefore, that among business men, accustomed to deal in this kind of paper, the receiving or offering it as security for an old debt, is not in itself calculated to excite suspicion, for the simple reason that it is according to usage; and if according to usage, presumptively at least, such use facilitates trade, and should receive the sanction of the courts unless there is some real substantial objection to it.

But in the case before us no such usage appears. On the contrary, the purpose for which the paper was used is exceptional and unusual. We apprehend that cases like this are rarely to be met with in business circles. Let us examine it more carefully. A man has a piece of negotiable paper, with which he wishes to pay or secure certain debts. If there is but one debt, he can transfer it directly to the creditor, and the law protects the transaction. That is according to the usual course of business. But if he transfer it to a friend, to hold till due, and then collect it, and with its avails pay the creditor, that is unusual and suspicious upon its face, and requires explanation. Unless some good reason can be shown for such a proceeding, the law ought not to protect it. But it is said that here were several creditors, which sufficiently explains the fact that the security was effected through the intervention of a trustee. Let us test this position. If the paper is right and free from defects, why not sell it in market, or

get it discounted, and, with its avails, pay the debts at once? Or, if the debts are not to be paid until the paper is due and collected, why not retain it in his own hands until due, and, if necessary, sue and collect in his own name? Such a course would be natural and usual. But what honest reason can be suggested why it should be transferred to a third party, who has no interest in the matter, to be sued in his name? Such a course is unusual, and not in due course of trade. The transaction at once suggests the idea that there is some equity in favor of the maker, inherent in the note itself, and which can be made available as against the payee, and which the payee is asking to avoid.

But there is another circumstance appearing in the case, which makes the unusual character of the transaction still more apparent. The creditors are informed of the transfer, they ratify and confirm it, and direct the commencement and prosecution of this suit. What occasion is there for all this, except to make it appear that the plaintiff is a trustee for the creditors? And why is it desirable that it should appear that he is a trustee for the creditors, unless for the very purpose of shutting out this defence? If Yale was in fact solvent, this proceeding was extraordinary and inexplicable upon any theory consistent with honesty and fair dealing. At least no sufficient reason for it appears in the case. If he was insolvent, another and insurmountable difficulty is at once encountered.

The conveyance not being in conformity to the provisions of our Insolvent Law, and operating to pay the creditors named in full, thereby giving them a preference, contravenes the policy of that law, and is therefore void as against creditors. Surely, it will not be contended that such a conveyance should receive the sanction of this court as a legitimate mercantile transaction.

The fact that a part of this money was payable to the wife of Yale, is worthy of notice also in this branch of the case. To that extent, as we have already seen, the plaintiff was the agent of Yale. We have no occasion to say that this circumstance alone renders this conveyance void at common law. But if there was a secret trust in favor of Yale, and the operation of the conveyance should be to defraud creditors, it certainly would be void as against creditors. A fraudulent conveyance can in no sense be said to be in the usual course of business. But be this as it may, the fact that Yale himself is still interested in this note,

either in his own right or in right of his wife, should suggest to all parties concerned an inquiry as to the reason and occasion of this conveyance.

We are not referred to any case directly in point, and are not aware that any exists; but we believe the views above expressed are in harmony with reason and good sense, and not in conflict with any adjudged case. In *Billings* v. *Collins*, 44 Me. 271, it was held that the assignment of negotiable paper, by operation of a bankrupt or insolvent law, was not in the regular course of trade, and that the assignee could only acquire the rights of the insolvent. The opinion of the court is brief, simply announcing the result without adducing any argument in its support; but we have no reason to doubt the correctness of the decision. So far as it goes it supports our position in the present case.

For these reasons, after careful consideration, we have come to the conclusion that this note was not taken in the regular course of business, and that the judgment of the court below upon that ground was erroneous and must be reversed.

In this opinion BUTLER, C. J., and FOSTER, J., concurred. PARK, J., was absent, and SEYMOUR, J., did not sit.

The foregoing case is certainly one of considerable importance to business men. Two questions seem to arise. Whether the endorsement was so far *bonâ fide* and for valuable consideration as to exclude equitable defences. 2. Whether the transaction comes so far within the range of ordinary commercial usage in the negotiation of bills and notes as to transfer an absolute title to the endorsee, or only one in trust for the real and ultimate benefit of the endorser, thus making the endorsee a mere agent of the endorser, and by consequence conferring no higher or better title than he himself has.

In regard to the first question, there could be no question so far as the endorsement was for the benefit of the wife of the endorser, merely as wife. The wife might have stood in the same relation as other creditors, by reason of having made advances to her husband. But nothing of that appears in this case. Her claim rests merely upon the relation of the parties, husband and wife, and the duties growing out of the relation. In this there is nothing of the nature of a valuable or pecuniary consideration. The consideration is good and ample to support any otherwise legal undertaking; but it is, after all, in the nature of a gift and must be postponed to the claims of creditors even; and could never be made the basis of an endorsement of negotiable securities, so as to exclude equitable defences based upon actual fraud in the concoction of the instruments.

And although the portion of the security sequestered for the benefit of creditors may be said to rest upon the valuable consideration, it is certainly not in the ordinary course of commercial transactions in the use of negotiable paper. It is more of the nature of a

general assignment of one's estate for the benefit of creditors; more analogous to going into insolvency or bankruptcy, than carrying forward business in the ordinary course. It is common and entirely in the due course of business to endorse a note or bill in payment or as security for a pre-existing debt, and such an endorsement of negotiable paper, before due, will exclude equitable defences. The cases are collected and classified in *Atkinson* v. *Brooks*, 26 Vt. 569; and the note to *Le Breton* v. *Peirce*, 1 Am. Law Reg. N. S. 35. But when such an endorsement assumes the form of a security for creditors generally, it at once suggests a trust for the benefit of the endorser, and no court, we think, would, under such circumstances, feel disposed to regard the transaction as excluding equitable defences. I. F. R.

Supreme Court of Iowa.

IN RE THOMAS U. RUTH.

A statute providing that no person shall sell intoxicating liquors without a permit, to be granted by the county judge, if on application he shall be satisfied that the applicant is a person "of good moral character," and that certain other requisites of the law are complied with, is constitutional.

THOMAS U. RUTH applied to the Circuit Court of Page county for permission to sell intoxicating liquors for medicinal, mechanical, sacramental, and culinary purposes: permission was refused, and thereupon he appealed to this court.

W. W. Morsman, for appellant.

No appearance contrà.

BECK, J.—By sections 1575–6 of the Revision, any citizen of the state, except hotel-keepers, keepers of saloons, eating-houses, grocery-keepers, and confectioners, were permitted to sell intoxicating liquors for mechanical, medicinal, culinary, and sacramental purposes, upon presenting to the county judge a certificate of twelve citizens of the township in which he resided that he was a man of good moral character, and a citizen of the county and state, and executing bond with sureties, and conditioned as therein prescribed. The duty of a person so authorized to sell liquors, and sundry regulations touching the same, are prescribed in these sections. These provisions are amended by chap. 128 of the Acts of the 12th General Assembly, which provides that upon application being made for the permission, a day shall be

fixed for the hearing, a notice thereof be given of the time and in the manner prescribed, and that any resident of the county may, on the day of final hearing, show cause against the allowance of the permission, which "shall be refused unless the county judge shall be fully satisfied that the requirements of the law have in all respects been fully complied with, that the applicant is a person of good moral character, and that taking into consideration the wants of the locality, and the number of permits already granted, such permit would be necessary and proper for the accommodation of the neighborhood." The application of appellant was rejected, as we gather from the abstract before us, on the ground that he was not a fit and proper person as contemplated by the law to receive the permission. No question is made upon this point. Counsel concede that appellant "does not possess the standard of morals contemplated by the statute." But it is argued that the law which limits the granting of permissions of this kind to persons of good moral character, is in conflict with the Constitution of the state and therefore void. The validity of no other provision of the statute is attacked. Counsel bases his argument upon article 1st, sect. 1st, of the Constitution, which declares that all men are equal and endowed with the right of acquiring, possessing, and protecting property, and sect. 6th of the same article, which forbids the General Assembly granting "to any citizen or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens." He argues that as intoxicating liquors are property, the General Assembly cannot restrict dealing in them for lawful purposes to any class of citizens—as to citizens of good moral character.

The breadth and design of these constitutional provisions, to secure equality of all and the enjoyment of property by all, are fully understood and as fully conceded. But the equality secured to the citizen cannot be exercised to the damage of the lives and property of others; neither can property be acquired, enjoyed, and disposed of to the peril of the lives, health, happiness, and property of others. The Constitution does not interfere with the police power of the state to protect the people in their lives, health, and property. The state is clothed with the power to prevent injury to these. See Constitution, Art. 1st, Sect. 1st. Gunpowder, nitro-glycerine, and other explosive agents are pro-

perty, yet the state may confine traffic in them to certain classes of persons, and confine the storage to certain localities. Certain poisons are property, but the sale of them may be restricted to certain persons, namely, those having sufficient intelligence to know when they ought to be used, and of sufficient character for prudence to give assurance that these deadly agents will not be carelessly administered. So intoxicating liquors are deemed by the law, agents that are dangerous to the morals, health, and lives of the people, though useful for proper purposes; their sale in the hands of men not of good character would be abused, and the people suffer therefrom. A preventive restriction is thrown around their sale by permitting men of good moral character alone to deal in them. But counsel exclaim, Have not men of bad moral character the same rights as men of good morals? Undoubtedly all are equal before the law as to the rights of property. But no one has the right to deal in these liquors, so far as his own interests are concerned; but as the wants of the people for certain lawful purposes demand that some should be allowed to sell them, the privilege is granted to certain persons not because they have a right to sell the liquors, but because the wants of the people demand the sale should be authorized to some extent, and they will be less likely to do injury than others who might be intrusted with the privilege. The sale of the liquors by all men of good morals is not permitted, and the law is not therefore intended, nor does it operate, to secure commerce in intoxicating liquors to all persons of that class. It has been found that the health and lives of the people demand that a few licensed persons be empowered to sell these liquors for lawful purposes, and that all others be forbidden to deal in them. Of those who are authorized, the law requires satisfactory proof of good moral character. In this respect it differs not from all license laws, which bestow privileges upon fit and proper persons making application therefor. These laws have always been sustained. The authorities cited by counsel are not in conflict with the foregoing views.

In our opinion the provision of the statute in question is not in conflict with the Constitution.

The judgment of the Circuit Court is affirmed.

The foregoing opinion certainly challenges attention, if not criticism.

The statute of Iowa, after providing for the prohibition of sales of intoxi-

cating liquors generally, provides further, "That any citizen of the state and resident of the county in which he may be at the time, except hotel-keepers, keepers of saloons, eating-houses, grocery-keepers and confectioners, is permitted to buy and sell intoxicating liquors for mechanical, medicinal, culinary, and sacramental purposes only: *Provided*, he shall first procure the certificate of twelve citizens of the township in which he resides that he is of good moral character and a citizen of the county and state, and shall give bond in the penal sum of not less than one thousand dollars, with two good and sufficient sureties to be approved by the county judge; that he will conform to the provisions of this act and the act to which this is amendatory:" § 1575, Rev. 1860.

The twelfth General Assembly passed an act; the 1st section requires that a day for final hearing be fixed at the time of filing the application for permits, and also requires notice of such final hearing to be given by publication; and provides further, as follows:—

Sect. 2. "At such final hearing any resident of the county may appear and show cause why such permit should not be granted, and the same shall be refused unless the county judge (Circuit Court now) shall be fully satisfied that the requirements of the law have in all respects been fully complied with; that the applicant is a person of good moral character, and that taking into consideration the wants of the locality, and the number of permits already granted, such permit would be necessary and proper for the accommodation of the neighborhood:" Chap. 128, Acts 12th General Assembly.

By the Constitution of Iowa, it is declared that "*All* men are, by nature, free and equal, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, *acquiring, possessing*, and *protecting property*, and pursuing and obtaining safety and happiness:" Art. 1, *Bill of Rights*.

The application of Ruth in the foregoing case was refused on the ground (a proposition which was admitted in argument) that the applicant was not possessed of that standard of morals required by the statute, and the refusal was sustained on appeal by the foregoing opinion.

That intoxicating liquors are property, and that the constitutional provision above recited contemplates that *all* citizens, moral and immoral, may acquire, possess, protect, and dispose of property, are propositions which seem to be admitted in the foregoing opinion.

And, that the rights secured to the citizen in the above constitutional provision cannot be exercised by one citizen to the exclusion of others in the enjoyment of the same rights, or rights guarantied by different provisions of the same instrument; that one citizen cannot enjoy his right of property to the damage of others in the enjoyment of their rights of property, health, comfort, morals, happiness, &c., &c., are propositions which may safely be conceded.

In short, this constitutional provision was made for *all*, as its language plainly imports, and for every species of property, certainly every kind of property recognised as such, at the time of the adoption of the provision above cited. The language is general. It is as broad and comprehensive as anything which could have been selected for the occasion. If it can be said that it does not apply to one kind of property, then it can be said with an equal show of reason that it does not apply to any other kind of property, which the prejudices of the hour may desire to place beyond the protection of the law.

The question is not, whether the constitution interferes with the police power

of the state to protect the people in their lives, health, and property. All of these are amply secured by the constitution, if justly administered. The general purpose of the constitution is to secure these rights to *all*, and it is plainly the duty, and within the power of the state (and this is its police power, as also the limit of that power) to pass laws which shall carry out that general purpose and intention.

The opinion above quoted adopts as the principle upon which it is proposed to stand, "That the equality secured to the citizen cannot be exercised to the damage of the lives and property of others; nor can property be acquired, enjoyed, and disposed of to the peril of the lives, health, happiness, and property of others." And this is not denied, for the reason that any other rule would produce inequality. But, we may add as the converse of this proposition, and in support of the other side of the case, that the right of the public to the preservation of its morals, health, happiness, &c., &c., cannot be enjoyed to the exclusion of the enjoyment of the right of property, because the same inequality would be thereby introduced. Yet this is the exact effect of the opinion quoted above, for the court in the same breath proceed to say, that an act which provides for, and produces precisely these consequences, is not in conflict with any constitutional provision.

We think the act in question *does* provide that one citizen or class of citizens may enjoy his or their rights under the constitution to the damage and even exclusion of other citizens or classes of citizens in the enjoyment of their rights.

To illustrate, let it be supposed that the whole community is divided into two classes, one of moral character and the other of immoral character in the sense of this act.

Does not the act in question say in unmistakable terms, that the portion of the community whose characters are moral shall enjoy their rights of property, health, happiness, public morals, &c., &c., to the exclusion of the other portion's right of property in intoxicating liquors? We think it does most clearly. The theory of the act is, that the right of property in intoxicating liquors cannot be enjoyed *in any manner* by a man of bad moral character, as contemplated by the act, without interfering with the moral portion of the community in the enjoyment of their rights to the preservation of the public morals, public health, &c., and in order to protect the latter the legislature of Iowa have undertaken to destroy the former, by saying that the immoral man shall not enjoy the right of property in intoxicating liquors *at all*. This is precisely what the court, in the foregoing opinion, have said cannot be done, with reference to the right of the citizen to the enjoyment of health, preservation of public morals, &c.

We agree with the court as to the breadth and design of the constitutional provision referred to.

It was intended to secure the right of property to *all*, and in *every* kind of recognised property. It was also intended to secure the right of the citizen and the public to the preservation of the public health, public morals, peace, quiet, happiness, &c., &c.

What then is to be done? Clearly it is the duty of the legislature, in the exercise of the police power of the state, to secure by appropriate legislation the enjoyment of *all* of these rights. It is as important that the right of the citizen to acquire and dispose of property should be protected, as that any other right should be. And to *abolish* the right to acquire and dispose of any one kind of property, even though it be in good faith to secure the more complete enjoyment of some other right, is just as much beyond the power of the legislature, as

it would be, to abolish the constitution *in toto*. Each right defined by the Bill of Rights is as sacred and inviolable as each other right therein defined, and to make any one yield to another, is to lay the foundation for that loose and irregular form of government which it was the design of the constitution, and of society organizing government, to prohibit. Something was wanted to define and secure certain natural, fundamental, and inviolable rights. It was thought that a written constitution would do this, but if the legislature, under pretence of more perfectly securing one of such rights, may abolish others, then the whole scheme is a failure.

We believe that the legislature have no such power, that all of the rights defined by the constitution are intended to stand together, that they should be reconciled into harmony and concord with each other, and that the police power of the state can only be exercised to carry out this purpose. It is the duty of the legislature (and of course within the power before-mentioned) to *regulate*, to prescribe the *mode* and the *manner* of enjoying these rights, and in doing so, the right may be very seriously affected, though a *substantial right must be left in all cases*. The police power is exhausted when it has done this. It cannot be extended to the abolition of the right itself, for if it could, the Bill of Rights would be subordinate to that vague and undefined power, and at the mercy of a legislature elected by a mere majority.

The principle is very concisely stated by JOHNSON, J., in *Wynehamer* v. *The People*, 3 Kernan 421; where it is said, "The same sort of question is presented in respect to the infringement by legislation of men's private rights, and the regulation of them, and their enjoyment. *The substantial right cannot be destroyed*; its enjoyment is not an offence, and legislation cannot make it an offence. At the same time the *mode* of enjoyment in its broadest sense, is subject to legislation, though it (the right) be affected very injuriously, provided a *substantial right is left.*"

Does the act in question, under the construction given, leave a substantial right of property in intoxicating liquors to Ruth? We think not.

The same question arises under statutes that affect the *remedy* on contracts, with reference to that provision of the Constitution of the United States which forbids the legislature to impair the obligation of contracts by law. The legislature may regulate the remedy, and may alter and abridge it so as to affect the value of the contract very materially "so long as they (contracts) are submitted to the ordinary and regular course of justice, and the existing remedies preserved *in substance* and with integrity: *Holmes* v. *Lansing*, 3 John. Cas. 75; *Morse* v. *Gould*, 1 Kern. 281.

The *substantial right* guarantied by the Constitution of the United States, to the citizen to enforce the obligation of his contract must not be destroyed by the legislature.

Again, the same question arises under statutes which assume to regulate the exercise of corporate franchises. The legislature may regulate the *mode* and the *manner* of enjoying the rights conferred by the charter, but it cannot destroy the charter itself or any essential right under it.

Thus, in *Benson* v. *Mayor*, &c., 10 Barb. 45, the court say, "The state may legislate touching them so far as they are *publici juris*. Thus, laws may be passed to punish neglect or misconduct in conducting the ferries, to secure the safety of passengers from danger and imposition, &c. *But the state cannot take away the ferries themselves, nor deprive the city of their legitimate rents and profits.*"

Why? Because the right of the city to the ferries and their legitimate rents

and profits was fixed by charter or contract, the obligation of which was held sacred by the constitution. If the legislature cannot destroy the rights of a corporation under a contract, the obligation of which is secured by the constitution for the preservation of the lives, safety, and comfort of the public, upon what principle can it destroy the rights of an individual whose rights are *directly* secured by the constitution?

The opinion of the Supreme Court of Iowa seems to be predicated upon the idea that the police power of the state is some extraordinary power which exists independent of the constitution, and which may be exercised by the legislature when the "public good" requires it in opposition to the constitution.

The true rule is, however, that whatever cannot be accomplished without an infraction of the constitution cannot be considered a "public good," and is in contemplation of law a public calamity when accomplished.

The police power of the state is derived from the constitution, and is no more than a power to carry out and enforce each and all of its provisions, and in no sense is it a power to destroy, when in the opinion of the legislature the "public good" or the "public morals" require it.

In the case of *Barker* v. *People*, 3 Cow. 686, the court said: * * * "The whole constitution must be supported, and all its powers reconciled into concord. A law which should declare it a crime to exercise any fundamental right of the constitution (as the right of acquiring and disposing of property, we add) would infringe an express rule of the system, and hence is not within the general power over crimes." * * * *

"Many rights are plainly expressed and intended to be inviolable in all circumstances. A law enacting that a criminal should, as a punishment for his offence, forfeit the right of trial by jury, would contravene the constitution, and a deprivation of this right could not be allowed in the form of a punishment. Any other right thus secured as universal and inviolable, must equally prevail against the power of the legislature to select and prescribe punishments."

From this case we see that the legislature, in the exercise of its plenary power over crimes and punishments, could not do what the legislature of Iowa has undertaken to do by the act in question. The legislature cannot declare it to be a crime to exercise the right of acquiring and disposing of property, nor can it declare a forfeiture of the right as a punishment for any other offence. Still, the exercise of the right in a particular *manner* may be declared a crime, or may be forfeited as a punishment for some other crime, so long as the *substantial right* itself is not declared forfeited or made criminal. It is upon this principle that all *regulation* rests. The legislature may prohibit sales of intoxicating liquors to be used as a beverage, for such legislation only goes to the *manner* of enjoying the right. The right can be "substantially" enjoyed without such sales. And the same rule we understand to apply to all other kinds of property, which under certain circumstances are acknowledged to be dangerous to the well-being of society.

The court say, in the foregoing opinion, that "certain poisons are property, but the sale of them may be restricted to certain persons, namely, those having sufficient intelligence to know when they ought to be used, and sufficient character for prudence to give assurance that these deadly agents will not be carelessly administered." This proposition is not denied, for it also only goes to the *manner* of enjoying the right, and is therefore not a parallel case. If the party desiring to "acquire, possess, and dispose of these deadly agents" does not himself possess the requisite qualifica-

tion, he can still enjoy the right "substantially," by employing some one possessed of the proper qualifications, to handle the property for him. Such legislation would undoubtedly affect the right, but it does not destroy it. It does not necessarily preclude the citizen from "buying and selling" to require him to buy and sell in a certain manner.

The legislature of the state in the exercise of the police power, to secure to all the substantial enjoyment of *all* the rights defined by the constitution, can compel the enjoyment by every individual of his rights in a *manner* not to conflict with others in the equal enjoyment of their rights, not however legislating upon the manner, so as to destroy the substantial right.

"*Sic utere tuo ut alienum non lædas*" is the maxim which lies at the foundation of the power. And to whatever enactment the maxim will not apply the power itself does not extend: Cooley Constitutional Limitations 577.

According to the foregoing opinion, however, it is not sufficient that the citizen should so enjoy his own rights as not to interfere with others in the enjoyment of theirs. But an immoral man must not enjoy certain of his rights *at all*. Not, indeed, because such enjoyment will *necessarily* interfere with others in the enjoyment of their rights, but because he *may* abuse the right.

If such a proposition can be maintained, then there is no right that is beyond the control of the legislature, for we *may*, and indeed all do, abuse almost every right that we enjoy. All the legislature can do is to prohibit the abuse, and punish us for a violation of the prohibition. No other theory is at all consistent with civil liberty.

Many other authorities might be cited in support of the foregoing views, but it is scarcely necessary. A moment's reflection on the practical application of the rule as stated in the opinion, in support of which no authorities are cited by the court, we think, will show that the doctrine cannot be maintained. The opinion is plainly inconsistent with itself, for the reason that the principle which the court states as the authority for protecting the public in the enjoyment of its health, comfort, morals, &c., &c., unless violated, will protect every individual, in some measure at least, of enjoyment of the right of property in intoxicating liquors, and every other kind of property as well. Such a substantial enjoyment is prohibited, however, to Ruth, by the statute in question and the opinion quoted above.

W. W. M.

United States Circuit Court. District of Indiana.

THE EVANSVILE NATIONAL BANK *v.* METROPOLITAN NATIONAL BANK OF NEW YORK, AND THE ASSIGNEES OF WATTS, CRANE & CO.[1]

A transfer of stock in a banking corporation, organized under the Act of June 3d 1864, to a *bonâ fide* holder, is valid though the seller or pledgor be at the time indebted to the bank, and a by-law of the bank declared that no transfer of the stock by any shareholder indebted to the bank should be made without the consent of the board of directors. Such a by-law in effect attempts to create a lien upon

[1] We are indebted to Josiah H. Bissell, Reporter for the United States Courts for the Seventh Judicial Circuit, for the following opinion.

stock for debts of the holder, and the result is the same as if a loan were made upon the security of the stock—a transaction forbidden by the 35th section of the Act.

APPEAL from District Court.

The Evansville National Bank was organized in January 1865 under the Act of Congress of June 3d 1864, 13 Stat. 99.

One of the articles of association provided that the directors might prohibit the transfer of stock without their consent. Accordingly a by-law declared that no transfer of the stock should be made without the consent of the board of directors by any shareholder who was indebted to the bank, and certificates of stock were to contain this provision. After the adoption of this by-law Watts, Crane & Co. became the owners of 150 shares of stock, and Crane, one of the firm, of 50 shares; certificates were issued for these shares in conformity with the above by-law.

Watts, Crane & Co. did business with the Evansville National Bank, and were indebted to the bank from the time they became holders of the stock for money loaned upon bills drawn, endorsed or accepted by them in the usual course of trading.

On the 15th of September 1866, Watts, Crane & Co. borrowed $30,000 of the Metropolitan National Bank of New York, and they and Crane delivered their certificates of stock as a pledge to secure the money so borrowed, and attached to the certificates, bills of sale, and power of attorney for the transfer of the stock.

On the 15th of April 1867, Watts, Crane & Co. became indebted to the Evansville National Bank on an acceptance for $25,000. At this time the Evansville Bank had no notice of the pledge previously made to the Metropolitan Bank. The members of the firm of Watts, Crane & Co. were declared bankrupts by the United States District Court of Indiana, March 3d 1868. The District Court held that the pledge to the Metropolitan Bank was binding, notwithstanding the by-law under which the Evansville Bank claimed a lien upon the stock.

The opinion of the court was delivered by

DRUMMOND, J.—The only question in the case is, whether this by-law was valid under the law of 1864 already cited. The 8th section of that act authorizes the board of directors to make by-laws, but declares they must not be inconsistent with its provisions.

The 35th section declares that no association shall make any

loan or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares unless to prevent loss on a debt previously contracted in good faith.

The counsel of the plaintiff in the able argument he has presented, claims that the operation of the by-law upon the shares of stock because of the indebtedness of Watts, Crane & Co., and their transfer to the Metropolitan Bank without the consent of the board of directors, was not a loan or discount made on the security of the shares; that there should be a distinct assignment or hypothecation of the stock as security for a loan or discount made; and some authorities have been cited which seem to maintain that principle. But if there is a by-law which declares in substance and effect that for all loans or discounts made to the shareholder a lien shall exist against his stock, the result would be the same as if there was a separate transaction and security given in each case. The shareholder always has the credit on the security of his stock, and thus the very object is accomplished which the 35th section sought to prevent—the absorption of the shares into the assets of the bank. And it will be observed that the law only allows the stock to be taken by the bank as security, or purchased to hold to avoid loss on a debt previously contracted in good faith, and on these the stock is to be retained by the bank only a limited time.

An extended examination of the authorities cited by counsel is unnecessary, because in the case of *The First National Bank of South Bend* v. *Lanier*, recently decided by the Supreme Court of the United States, (11 Wallace 369), the question involved here is discussed by that court, and a principle established that is decisive of this case.

In that case the bank had made a by-law declaring that the stock of the bank should be transferred only subject to the provisions of the 36th section of the Act of 1863 (by which a shareholder was prevented from transferring his stock when he owed the bank). The bank sought to avail itself of this by-law notwithstanding the repeal of the 36th section by the Act of 1864, and the court held that could not be done. This is in effect deciding that no such by-law could be in force under the provisions of the Act of 1864. The language of the court is, "Congress evidently intended, by leaving out of the law of 1864 the 36th section of the Act of 1863, to relieve the holders of bank shares

from the restrictions imposed by that section. The policy on the subject was changed, and the directors of banking institutions were in effect notified that thereafter they must deal with their shareholders as they dealt with other people. As the restrictions fell, so did that part of the by-law relating to the subject fall with them."

The decision of the District Court is affirmed.

United States Circuit Court. Southern District of Alabama.

NEWTON ST. JOHN *v.* THE SOUTHERN EXPRESS COMPANY.

The reception by an express company of a package for transportation directed to a point beyond its route, and the receipt of the entire compensation for the transportation to that point is sufficient to make out a *primâ facie* case of contract to carry and deliver the package to that point.

To avoid liability in such case the company must show a specific contract to carry only to its own terminus, or a settled and uniform rule not to assume liability beyond that point, which rule must be brought home to the consignee either by express notice or by a notoriety so general that he may fairly be presumed to have had notice.

Plaintiff delivered a package marked to a consignee in New York, to defendants an express company in Mobile, paid the freight for the entire distance, and took a receipt stating "that this company is to forward the same to its agent nearest or most convenient to destination only, and then to deliver the same to other parties, they to complete the transportation; such delivery to terminate all liability of this company for such package." The company's route extended only to Lynchburg, but it had an arrangement with Adams Express Company to transport such packages to any point on the latter's route, and receive a *pro rata* share of the freight. *Held*, that the Adams Express Company was the agent of defendants within the terms of the receipt, and defendants were liable for failure to deliver in New York.

If an express company have a settled and uniform rule that money packages must be sealed and endorsed in a certain manner, and such rule is brought home to the knowledge of the consignor who neglects or intentionally omits to comply with it, and the company, in ignorance of the special value of the package, takes ordinary care of it only, the company will not be liable for its loss.

If, however, the money is stolen or converted by an agent of the company, the latter will be liable for its value on a count for money had and received, notwithstanding the violation of its rules by the consignor.

THIS was an action against a carrier for failure to deliver goods delivered to it for transportation.

R. H. Smith and *T. H. Herndon*, for plaintiff.

Wm. G. Jones and *J. P. Southworth*, for defendant.

WOODS, J., charged the jury as follows:—

Gentlemen of the jury:—The plaintiff claims that the defendant being a common carrier, on the 26th day of May 1866, undertook and agreed with plaintiff, for a valuable consideration, to transport from Mobile, Alabama, and to deliver to J. B. Alexander & Co., in the city of New York, a sealed package which the plaintiff on that day delivered to the agents of defendant in Mobile, containing six thousand dollars, the property of the plaintiff. That by and through the negligence and carelessness and improper conduct of the defendant and its servants, said package and its contents were wholly lost to the plaintiff.

Plaintiff further avers that on the 3d day of June 1866, the defendant as such common carrier, undertook and agreed with the plaintiff for a valuable consideration, to transport from Mobile, Alabama, and to deliver to J. B. Alexander & Co., in New York city, another sealed package, which the plaintiff on that day delivered to the agents of defendants in Mobile, containing five thousand dollars, the property of the plaintiff, and that by the negligence, carelessness, and improper conduct of the defendant and its servants, said last-named package and its contents were also wholly lost to the plaintiff. He thereupon seeks to recover of the defendant the amount of money contained in said packages, with interest. He has also included in his declaration counts for money had and received, and upon an account stated. The defendant pleads the general issue, with leave to give in evidence any matter that might be specially pleaded.

This action is brought against the defendant as a common carrier. The undertaking of a common carrier is to deliver the goods intrusted to him against all events but the act of God, or the public enemy, unless his liability is limited by contract.

Before the plaintiff can recover, he must establish his case by proof substantially as he has stated it. Your first inquiry will therefore be, did the plaintiff deliver the packages containing money, or either of them, to the defendant, to be carried to New York, and delivered as alleged, and did the defendant, for a valuable consideration, undertake and agree to convey them to New York city, and deliver them to J. B. Alexander & Co., as the plaintiff avers, and has the defendant failed so to deliver them?

On the question of the delivery of the packages to the agent of the defendant in Mobile, and the failure of the defendant to deliver them to J. B. Alexander & Co., in New York, I presume you will have little trouble. I do not understand the defendant to controvert these facts. They must be proven, however, to your satisfaction. But the defendant alleges that its lines of business reach only as far north as Lynchburg, Virginia, on the route to New York city; that this fact was known to plaintiff, and that its agreement was not to convey the packages to New York, but to convey them to Lynchburg, Virginia, and then safely to deliver them to Adams' Express Company; that it did so transport and safely deliver the packages, and that it is therefore not liable to plaintiff for any loss which occurred after such delivery to the Adams Express Company.

You are to decide, gentlemen, from the facts in the case, and controlled by the rules of law as I shall give them to you, what the contract of the defendant with the plaintiff was.

I instruct you that the reception by an express company of a package for transportation directed to a point beyond the route of the express company, and the receipt by such company of the entire compensation for the transmission and delivery of the package to the point to which it is directed, makes out a *primâ facie* case of a contract to carry and deliver the package according to the superscription, and will bind the company unless a different contract is shown, or a settled and uniform rule established by the company not to be bound beyond its own line, which rule is brought home to the consignor either by express notice or by a notoriety so general that he may fairly be presumed to have had notice.

If you find the fact to be that the defendant received the packages of the plaintiff directed to J. B. Alexander & Co., New York, for transmission, and received the pay for the entire route from Mobile to New York, then I instruct you that *primâ facie* the plaintiff has shown a contract on the part of defendant to carry the packages to New York and deliver them according to the direction, and that the Adams Express Company and its servants were the agents of defendant to complete said transmission and delivery. This proof would, however, only make a *primâ facie* case, and the defendant may rebut it by other proof.

It was competent for the defendant to contract that it was to

be bound for the safe transmission of the packages over its own lines only, and if it has satisfied you by proof that it did so contract, then it cannot be held liable for the default of the Adams or any other company which undertook to complete the conveyance of the packages.

I believe it is not claimed that the defendant made any such contract expressly with the plaintiff, but it is insisted that such contract may be fairly implied from the form of receipt given by the defendant for money packages, and that such receipts must, from their general use by the company, have been known to the plaintiff. The defendant says that its receipts for money packages contained a provision in these words: "that this company is to forward the same to its agent nearest or most convenient to destination only, and then to deliver the same to other parties, they to complete the transportation; such delivery to terminate all liability of this company for such packages."

You will first determine from the proof whether the contents of this receipt were brought home to the knowledge of the plaintiff. If you find they were, then I say to you, that the true construction of this provision is that the defendant undertakes to deliver packages at any point upon its own routes or upon the routes of any other company with which it has an arrangement to receive, convey, and deliver packages for a *pro rata* share of the compensation paid by the shipper, but when the terminus of its own route or the route of such a connecting company is reached, and the package is to go to a point beyond, then the defendant is only bound to deliver the same to other parties to complete the transportation, and on such delivery its liability ceases.

I instruct you, gentlemen, that if you find from the proof that there was an understanding between the defendant and the Adams Express Company, by which the latter agreed to receive from the former at the end of its route all packages for transmission over the routes of the Adams Express Company, and to deliver them according to the superscription at any point on the routes of the Adams Express Company, and received a *pro rata* share of the money paid the defendant for the transportation of the package, then the Adams Express Company was the agent of the defendant referred to in the language of the receipt. And if the Adams Express Company had an agency or office in New York, it would have been the duty of this defendant, under that receipt, to carry

the package to New York, either by itself or its agent, the Adams Express Company, and then deliver it according to its superscription. You are not, however, to confine your consideration upon this point to the terms of this receipt exclusively. You may examine the way-bills and other blank forms of the defendant to ascertain what its contract was, and you may take into consideration any statements you may find to have been made to plaintiff by the superintendent or other agent of the defendant in reference to the transmission of these or other packages, or any special contract or understanding made by defendant's agent with plaintiff.

If you shall find under these instructions that the defendant only contracted to carry the packages of the plaintiff over its own routes, and then to deliver them to another company for transmission to its destination, and that it has performed this contract, then that is an end of the case against the defendant, so far as its liability as a common carrier is concerned. If, however, you find that the defendant undertook to convey the packages to New York and then deliver them to the persons to whom they were addressed, you will then proceed to consider another branch of the defendant's defence. This is, that the rule of the defendant was that packages containing money should be sealed in a certain way, that the amount of the contents should be endorsed upon the package, and a certain rate of compensation for carriage in proportion to the amount of money conveyed should be paid. That the plaintiff, well knowing this rule, placed the money which he alleges was lost in an envelope not sealed according to the rules, nor containing a statement endorsed upon the envelope of the amount of the contents, and that he only paid the rate charged by the defendant for the transmission of an ordinary letter containing no enclosure of value; and that by reason of this default on the part of the plaintiff the packages were intrusted to an agent of the Adams Express Company in New York, who was only employed to deliver ordinary letters, and not valuable packages, and was thereby lost.

Upon this branch of the defence I instruct you, that the rules of the company, in order to have any influence upon the decision of the case, must have been known to the plaintiff, and these rules must have been settled and uniform. If these rules were not by the proof brought home to the notice of the plaintiff, or if the

defendant was in the habit of departing from them, and allowing exceptions to be made to them, and these facts were known to plaintiff, or if there was any understanding or agreement between the plaintiff and the agent or superintendent, that the rule was not to be enforced against the plaintiff, in either of these cases the existence of the rules can have no effect upon the decision of this case. In short, the rule must be settled, uniform, and known to plaintiff. If you find they were thus settled, uniform, and known to the plaintiff, and no exception was made by the agent of defendant in his favor exonerating him from a compliance therewith, and you find that the contents and value of the packages sent by plaintiff were improperly concealed by him from the defendant for the purpose of depriving the defendant of a part of the compensation it would otherwise have claimed for the transportation and risk, the defendant would not be liable if using the ordinary vigilance which a prudent man would exercise over his own property of the same apparent value. I instruct you further, that if by reason of the failure of the plaintiff to comply with the rules of the defendant known to him, the defendant was ignorant of the value of the package, and, in consequence thereof, was induced to intrust the package to a messenger who was employed only to deliver packages of no intrinsic value, and failed to place it in the hands of its messenger known to be honest and trustworthy, who was uniformly employed to deliver valuable packages, and by the dishonesty of the messenger to whom the package was intrusted, it was lost, in that case the defendant would not be liable.

If you should find for the defendant upon these issues, it would nevertheless be your duty to consider that branch of the plaintiff's case which arises upon what are called the common counts. Under them the plaintiff claims that the Adams Express Company is the agent of the defendant, that the Adams Company, as such agent, has not lost the money of plaintiff, or all of it, but has it or a large part of it in its possession, or has converted it to its own use. If you find, under the instructions already given you, that the Adams Express Company is the agent of the defendant, and that it has retained the money of the plaintiff in its possession, or has recovered it from any person who stole it, then you should find a verdict for the plaintiff for the amount which you may decide has come to the possession of the Adams Express

Company and is retained by it, or has been converted by it to its own use, with interest from the date of demand if you should find that a demand has been made, if not, from the commencement of this suit. For although the plaintiff may have knowingly violated the rules of the defendant in the manner of transmitting this money, still that does not divest the plaintiff of his property in the money, nor authorize the defendant, either by itself or its agent, to confiscate it. The defendant is bound to pay it over on demand with interest from the date of demand.

Supreme Court of Pennsylvania.

SCHUYLKILL COUNTY *v.* PETER COPLEY.

Where a bond is signed by an illiterate person upon misrepresentations as to its contents it is not his deed, but is void *ab initio*. In such case it is not material whether the obligee had knowledge of the misrepresentation or not. But where the contents are correctly stated, but the obligor is induced to sign it by misrepresentations of facts, it is his bond, though he may avoid it for the fraud.

It is not the nature of the punishment but of the offence which determines its infamous character so as to disqualify a witness convicted of it, and embezzlement is not in Pennsylvania such a crime.

ERROR to the Court of Common Pleas of Schuylkill county.

This was a feigned issue to try the question whether a certain bond, on which judgment had been entered under a warrant of attorney, was the deed of Peter Copley, as one of the sureties of Thomas Fogarty, a collector of taxes. It was proved on the trial that Fogarty obtained the signature of Copley, who was an illiterate man, by representing to him that the paper was a petition to the county commissioners for his appointment as tax-collector.

The opinion of the court was delivered by

AGNEW, J.—The county contended that the deception mattered not, unless it be shown that the county had a knowledge of the fraud before accepting the bond. The court below held that the misrepresentation of the contents of the paper avoided it as a bond. The issue, therefore, was the same as if, to a declaration on the bond, *non est factum* had been pleaded. The instruction of the court was right and follows the distinction stated in *Green* v. *North Buffalo Tp.*, 6 P. F. Smith 114, between a defence

resting upon facts which are misstated in order to induce a party to enter into a bond, the contents of which he knows; and one resting on a misrepresentation of the *contents* of the instrument itself, to an *illiterate* person. In the former it was said the bond is the obligation of the party who seals it, but is avoided by the false inducement to enter into it; in the latter it is *not his deed* or bond at all. No authority was cited for this elementary principle, and it is argued that the second proposition is unsound. But it was the first resolution in *Thoroughgood's Case*, in the time of Lord COKE, 2 Reports 9 b, in these words: "First, that although the party to whom the writing is made, or other by his procurement, doth not read the writing; but a stranger of his own head read it in other words than it in truth is; yet it shall not bind the party who delivereth it; for it is not material who readeth the writing, so as he who maketh it be a layman, and being not lettered, be (without any covin in himself) deceived, and that is proved by the usual form of pleading in such a case, that is to say, that he was a layman and not learned and that the deed was read to him in other words, &c., generally, without showing by whom it was read." The second resolution in *Thoroughgood's Case* was that an illiterate man need not execute a deed before it is read to him in a language he understands; but if he do, without desiring it to be read, the deed is binding. And see 2 Blackst. Com. *304–308. And says Mr. Chitty, in his Pleadings, vol. 1, *483. The defendant may give evidence under the plea of *non est factum* that the deed was *void* at common law *ab initio; or that it was obtained by fraud;* or whilst the party was drunk, a married *woman*, or a lunatic; or that it became void after it was made and before the commencement of the action, by erasure, alteration, addition, &c. See also 1 Saunders on Pl. & Ev. *407. The very point in this case was decided in *Stover* v. *Weir*, 10 S. & R. 25. That was an action on a single bill to which a defence was set up that the writing had been obtained by falsely reading it as a receipt, and requesting the defendant to sign it as a witness. The plea setting forth the facts specially was treated as a special *non est factum*. See also *Bauer* v. *Roth*, 4 Rawle 93, 94, per KENNEDY, J. These authorities show that the learned judge committed no error in his charge.

But we think the court erred in the rejection of Thomas

Fogarty as a witness on the ground of *infamy*. Fogarty had been convicted and sentenced for embezzlement of the county's money, as a tax-collector, under the 65th section of the Act of 31st March 1860, Brightly's Dig. 229, pl. 73; and was in prison under his sentence. The punishment of the offence of embezzlement under this section is imprisonment by separate or solitary confinement at labor not exceeding five years, and a fine equal to the amount of the money embezzled. The punishment is the same in kind as that inflicted for infamous offences in Pennsylvania; but it is now settled that it is not the nature of the punishment, but of the offence, which determines its infamous character: 2 Russell on Crimes 974; 1 Greenleaf Ev. § 372, in note 3; 3 Casey 465. Infamous crimes are treason, felony, and every species of the *crimen falsi*, such as forgery, perjury, subornation of perjury, and offences affecting the public administration of justice; such as bribing a witness to absent himself and not to give evidence, and conspiracies to obstruct the administration of justice, or falsely to accuse one of an indictable crime: 2 Russell on Crimes 973; 1 Greenleaf's Ev. § 373. This is clearly the limitation of the infamous crimes as understood in this state; as may be seen in the following cases: *Commonwealth* v. *Shaver*, 3 W. & S. 342–3; *Bickel's Exr.* v. *Fasig's Admr.*, 9 Casey 464–5. And see argument of counsel in *Commonwealth for use* v. *Ohio & Pennsylvania R. R. Company*, 1 Grant 331, 2, 3, 4. There are many offences, involving both falsehood and fraud, which are punished as infamous crimes are usually punished in this state, and yet are not infamous crimes, and will not exclude the offenders as witnesses: *Commonwealth* v. *Shaver*, and *Commonwealth* v. *Ohio & Pennsylvania R. R. Co.*, supra, 1 Greenleaf's Ev. § 373. In Massachusetts it is held that the offences of receiving stolen goods knowingly, and cheating by false pretences, will not render the offenders infamous: *Commonwealth* v. *Rogers*, 7 Metcalf 500; *Utley* v. *Menich*, 11 Metcalf 302; and see 1 Whart. C. L. § 761. As remarked by WOODWARD, J., in *Bickel's Exr.* v. *Fasig's Admr.*, 9 Casey 465, the tendency of the judicial mind is against objections to competency. Such also is the direction of legislation, to be seen in § 181 of the Act of 31st March 1860, Brightly's Dig. 247, pl. 190, which gives to a convict who endures his punishment, for a felony or any misdemeanor punishable with imprisonment at labor, the advantage of a full pardon, except as to wilful

and corrupt perjury. Fulfilling his sentence, therefore, restores the offender to competency as a witness. The Act of 15th April 1869, declaring that no interest or policy of law shall exclude a party or person from being a witness in any civil proceeding, runs in the same direction. In all these cases the objection goes to the credibility of the witness rather than to his competency. For the error in rejecting the witness, the judgment is reversed and a *venire de novo* awarded.

United States Circuit Court. Districts of Missouri.

STATE NATIONAL BANK v. FREEDMEN'S SAVINGS AND TRUST COMPANY.

A certificate of deposit payable to the order of depositor on the return of the certificate was issued by Bank A. to T. D., who could not write. The bank took his mark on its signature book, and wrote a description of him opposite. Shortly afterwards the certificate was stolen from T. D. and presented to Bank B. by a stranger who gave his name as T. D. and said he could not write. Thereupon the cashier of Bank B. endorsed the certificate to his own order with the name of T. D. to which the stranger made his mark, and an employee of Bank B. added his signature as "witness to mark." The cashier then endorsed the certificate and sent it through a correspondent to Bank A., which thereupon paid it, and the money was handed over to the stranger. Thereafter the real T. D. appeared at Bank A., and on discovery of the forgery Bank A. paid him the amount and brought suit against Bank B. to recover the payment on the forged endorsement. *Held*, that Bank A. had a right to rely on the identification of T. D. by Bank B. and could recover.

On the 7th day of November 1870, Tim Dunivan deposited in the State National Bank at Keokuk, Iowa, nine hundred dollars, and received therefor a certificate of deposit, of which the following is a copy:—

"$900 State National Bank, Keokuk, Nov. 7, 1870.

Tim Dunivan has deposited in this Bank Nine Hundred Dollars current funds, payable to the order of himself hereon in like funds on the return of this certificate.

In currency $900. [No. 4991.]

G. W. Horton,
for Teller."

Tim Dunivan was unable to write, and therefore placed upon the signature book of the bank his mark, the officers of the bank

at the same time writing his description opposite the mark on the book.

Dunivan went off on the river, and on or about the 20th of November the certificate was stolen from him.

About the 1st of December a man presented the certificate at the counter of the Freedmen's Savings and Trust Company, and asked the cashier to cash it. The cashier refused, on the ground that the person presenting it was a stranger to him, but offered to take it for collection. To this the stranger acceded. The cashier asked him if his name was Tim Dunivan; he replied "yes." He then asked him if he could write his name, and receiving an answer in the negative, the cashier himself wrote the following endorsement: "Pay to the order of W. N. Brant, cashier. Tim his mark Dunivan," the party himself making the cross-mark. The mark was then witnessed by W. P. Brooks, a man who did odd jobs about the bank, as follows: "Witness to mark, W. P. Brooks, St. Louis, Mo." Neither Mr. Brant nor Mr. Brooks was acquainted with the man offering the certificate.

The certificate was then endorsed by Mr. Brant, as follows: "Pay Bower, Barclay & Co., for collection, acct. of W. N. Brant, Cashier," and forwarded to Bower, Barclay & Co. for collection, by whom the certificate was collected and the proceeds remitted to Mr. Brant, and by him paid to the party who had left the certificate for collection. On the 22d of December, Tim Dunivan appeared at the bank in Keokuk, and claimed that the endorsement was a forgery, and that he had never received the money. Thereupon the Keokuk bank paid him the amount and brought this suit against the Freedmen's Saving and Trust Company to recover the amount paid it through its correspondent.

The evidence adduced at the trial disclosed the above facts. It further appeared that the cashier of the Keokuk bank, when the certificate was presented from Bower, Barclay & Co., simply looked at the back of it, and remarked that "he guessed it was all right—the endorsers were good." No information was given by plaintiff's officer to Bower, Barclay & Co., or to defendant, as to the description of Tim Dunivan which had been placed upon its books; and there was no evidence as to when the plaintiff gave notice of the forgery, except that the cashier of defendant testified that notice was not given him until some time after the discovery.

Noble and *Hunter*, for plaintiff.

E. W. Pattison, for defendant.—Conceding that Brooks's attestation meant that he knew the man signing to be Tim Dunivan, it does not follow that he knew him to be *the* Tim Dunivan to whom the certificate was issued.

All the cases we have been able to find with reference to the force of an attestation are cases where the question has arisen upon the effect of *proof of the handwriting* of a dead or absent subscribing witness.

Many of these cases go to the length of holding that where such subscribing witness's signature is proved, this is not only *primâ facie* evidence that the name signed to the instrument as a party is genuine, but of the *identity* of the party sought to be charged if the name which is signed is his.

On the contrary there is a respectable number of cases which hold that the *identity* must be proved *aliunde*. Of these latter we cite *Whitelock* v. *Musgrove*, 1 Cr. & Mees. 511; *Middleton* v. *Sandford*, 4 Camp. 34; *Parkins* v. *Hawkshaw*, 2 Stark. 239; *Nelson* v. *Whitall*, 1 B. & Ald. 19; and American cases, *Robards* v. *Wolfe*, 1 Dana 155. See also 2 Philips on Evid. 505–7.

But all these were cases of actions on the instruments, and the utmost extent to which they go is that *when the attesting witness's signature* is proved identity of the party executing the instrument with the party sought to be charged will be presumed, subject, however, to be rebutted by showing that it was really executed by a different person.

But it is claimed here that the mere fact that there *is an attesting witness* will authorize plaintiff to presume that the man signing the certificate is their customer to whom they issued it, whose mark is on their books and whose description is there too; so that they need trouble themselves no more about it.

It may be remarked that *actual* identification here is impossible. The most that Mr. Brooks could say was that he knew the man writing to be *a* Tim Dunivan. See *Graves* v. *Am. Exch. Bank*, 17 N. Y. 205.

Why should the fact that this depositor signed by a mark change the duty of the plaintiff, or relieve it of any exercise of care?

It has been held that a mark is an endorsement: *George* v.

Surry, Moody & M. 516 (without attestation); so the initials, "P. W. S.:" *Merchants' Bank* v. *Spicer*, 6 Wend. 443; so the figures, "1, 2, 8:" *Brown* v. *Butchers' Bank*, 6 Hill 443.

Now, if these are all *signatures*, and the bank is bound to know the signatures of its customer (as the authorities show: *Smith* v. *Mercer*, 6 Taunt. 76; *Stout* v. *Bewist*, 39 Mo. 277, and many other cases), why should it not be bound to know initials, or figures, or a mark, as well as a name? That the former are more easily counterfeited than the latter should increase the vigilance of the bank issuing the certificate, but does not change the law.

Suppose the deposit had been made in the usual way and a pass-book given, and somebody had drawn a check, signed it Tim $\overset{\text{his}}{\underset{\text{mark}}{\text{X}}}$ Dunivan, and it had been attested; would not the bank have to bear the loss if it paid it? Could it recover it back from the holder of the check?

2. Conceding that Brooks's attestation meant that he knew the man, it does not follow that plaintiff had a right to presume that W. N. Brant, cashier, knew the man to be Tim Dunivan, or that he guarantied the endorsement in any way. He (Brant) had a right to depend on the fact that plaintiff would know its own customer.

We insist that there was negligence on the part of plaintiff—in this—

1. It should have taken some pains to ascertain whether its customer had really endorsed the certificate.

2. It should have notified defendant of the forgery promptly—this it did not do.

Mr. Morse, in his work on Banks and Banking (p. 300), expresses this very succinctly:—

"It is unquestionable that if the payee has, upon the strength of the payment, released any security or abandoned or lost any possible safeguard or protection from loss, it is too late for the bank to undo the error at his expense."

And further he says, "Where the bank seeks to recover from the payee it is held rigorously to make the discovery of the forgery and to give notice of it to the holder with great promptitude."

Indeed, in such a case as this the doctrine laid down in *Cocks* v. *Masterman*, 3 Barn. & Cress. 92, and other cases which have

followed it: *Wilkinson* v. *Johnson*, Id. 428; *Price* v. *Neal*, 3 Burr. 1354, and other cases, does not seem too strong.

The very mildest case involving this principle is that of *Canal Bank* v. *Bank of Albany*, 1 Hill 292; yet there it is held that *reasonable diligence* in giving notice is necessary.

TREAT, J., charged the jury as follows:—

Gentlemen of the jury:—The case you are trying turns mainly on the question of negligence. The fact that defendant is a corporation is in proof. You have then the plaintiff a corporation and the defendant a corporation.

The rule of law usually is, that where a certificate of deposit is issued by a bank, and it comes back to the bank issuing it with the endorsement of the depositor through the hands of *bonâ fide* innocent parties, the endorsement being forged, the bank paying the deposit certificate must lose it; for they are presumed to know the signatures of their customers, and the bank issuing the certificate has the means of verifying the signature.

This is a different case. Here was a person who could not write. The bank gave him the certificate and took his description. The ordinary mode, where a person signs by his mark, is to have him identified, so that a piece of paper coming back to the Keokuk Bank through respectable institutions, with the depositor's mark on the back of it witnessed by another party, the bank issuing the certificate would have the right to suppose that the bank sending the certificate had so identified the man making his mark. The witness's signature is proven. Mr. Brooks himself says he signed it. The simple fact, then, that the paper comes back to the bank at Keokuk with a mark witnessed by Mr. Brooks, which means that he knew Mr. Dunivan to be the person who made that mark, is sufficient to justify the Keokuk bank in paying the draft.

This, gentlemen, is all there is of the matter.

The jury found a verdict for the plaintiff.

Supreme Court of Mississippi.

JUSTINE MEZEIK *v.* PATRICK H. McGRAW.

Where a complainant in chancery amends his bill after answer filed the defendant is entitled to be informed of the amendment either by notice under rules of court or by service of process under the amended bill.

After such notice or service the complainant must have a decree that the amended bill be taken *pro confesso* for want of an answer before he can be entitled to a final hearing and decree.

A statute of Mississippi enacted that any promissory note or other contract for the payment of money executed in that state between March 1st 1862 and May 1st 1865, should be *primâ facie* payable in Confederate notes unless it appeared otherwise on the face of the contract. On a bill in chancery to foreclose a mortgage given to secure such a note and a decree *pro confesso* for want of an answer, there being no proof to show the note to be payable in other money, the reference to the master should have been to ascertain the value of Confederate notes.

APPEAL from the Chancery Court of Adams county.

Claudius Mezeik, on the 10th day of September, 1862, at the city of Natchez, in the county of Adams, Miss., made his promissory note for $2400, payable to Patrick H. McGraw one year from date, and on the 16th day of September, 1862, the said Claudius Mezeik and Justine his wife executed a deed of mortgage to Patrick H. McGraw on certain lands situate in said county of Adams, to secure the payment of said note. In the year 1865 the said Claudius Mezeik departed this life, leaving a will by which he gave to his said wife Justine Mezeik all his property, real and personal, and appointed her executrix of his said will.

The said Patrick H. McGraw filed his original bill of complaint to the October Term of the Chancery Court of said Adams county, 1867, against the said Justine Mezeik for a foreclosure of the said mortgage and the sale of the property therein specified for the payment of said note and interest. The defendant appeared and demurred to the bill for want of equity upon its face. Which demurrer was overruled by the court, and the defendant then answered the bill, setting up therein certain proceedings in the military court at Natchez as a defence to the bill. At the October Term 1868 of said court, by leave thereof, the complainant filed an amended bill, and without any legal notice thereof to the defendant, or service of process upon her to appear and answer the same, the court proceeded to a final hearing of the cause. Without an answer to the said amended bill, or taking the same *pro confesso* for want of an answer, the court ordered a reference to the clerk to take and state an account of the principal and interest on said note, and that he report the same to the court; and in compliance with said order of reference, the clerk reported that the sum of $3584.60 was due complainant of principal and interest on said note. To the report the defendant filed her ex-

ceptions, on the ground that the note was *primâ facie* evidence that the payment thereof was to be made in Confederate treasury notes, and that there was no proof of the value of Confederate treasury notes. The exceptions were overruled, the report confirmed, and the court decreed that the defendant pay to the complainant the amount then found due him within thirty days, and in default thereof that the property be sold and proceeds applied to the payment of the money found due to the complainant.

From this decree the defendant brought the cause to this court by writ of error.

The opinion of the court was delivered by

PEYTON, J.—The plaintiff in error makes several assignments of error, of which in the present attitude of the case it is necessary to notice only the second, fourth, and fifth, which are the following:—

2d. The court erred in proceeding to make an interlocutory order for an account, immediately after said bill was amended, without notice to said defendant or an opportunity for her to answer said bill as amended.

4th. The court erred in directing a reference to a commissioner to report an account of principal and interest due complainant upon the note and mortgage. The said note being dated 10th September 1862, and due at twelve months, was payable *primâ facie* in Confederate treasury notes, whereas said order of reference, if made at all, should have been made for the value of Confederate money with interest.

5th. The court erred in overruling the defendant's exceptions to the report of the commissioner, and also in confirming the report.

By the English Chancery Practice, if the amendment of the bill be before answer, it seems that no additional subpœna need be served upon the defendant, but he is entitled to the full time for answering from the when time he is served with notice after amendment. If the amendment be after answer, and a further answer be required, a subpœna must be served, but service on the defendant's solicitor is sufficient: Daniel's C. P. 27. Although it is the practice to call a bill altered an amended bill, the amendment is in fact esteemed but as a continuation of the original bill, and as forming a part of it for both the original bill and the

amended bill form but one record, so much so that when an original bill is fully answered, and amendments are afterwards made to which the defendant does not answer, the whole record may be taken *pro confesso* generally, and an order to take the bill *pro confesso* as to the amendments only will be irregular: 1 Daniel's C. P. 403.

Where the complainant amends his bill after answer, if a further answer to the bill becomes necessary, and is not waived, the defendant must put in a further answer to the amendment, or the complainant will be entitled to an order taking the whole bill as amended as confessed: *Trust and Fire Ins. Co.* v. *Jenkins*, 2 Paige 589, and *Sedder* v. *Stiles*, 16 Georgia 1. A rule of the chancery practice in this state requires that whenever the complainant shall file an amended bill or supplemental bill, he shall give notice thereof in writing to the opposite party or his solicitor within twenty days after the same shall be filed; and no decree *pro confesso* on such amended or supplemental bill shall be taken without proofs of such notice, unless process shall have been served upon the opposite party under the amended or supplemental bill. The amendments to the original bill were of such a character as to entitle the defendant to notice of them either in writing or by service of process. The court below therefore erred in proceeding to hear the cause without giving the defendant an opportunity to answer the amended bill, and even had she been notified of the amendments to the bill, it would have been error to proceed to a final hearing of the case without having previously taken the bill as amended as confessed, for want of an answer: *Beville* v. *McIntosh*, 41 Miss. 516. The Statute of 1867 provided, in all cases founded on any promissory note, open account, or other contract for the payment of money executed in this state after the 1st day of March 1862 and before the 1st May 1865, that fact shall be *primâ facie* evidence that the payment was to be made in Confederate treasury notes, unless the contrary appear on the face of said contracts. In this case the complainant's claim is founded on a promissory note executed in this state on the 10th day of September 1862, which is *primâ facie* payable in Confederate treasury notes; and as there was no rebutting or countervailing proof to show that the note was payable in anything else, the order of reference should have been for the value of Confederate treasury notes, with interest, from the date of